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October Term, 1982

In the

Supreme Court of the United States

No. ___
Mabel Huckaby
Petitioner

V.

United States of America
Respondent

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

SAMUEL A. PERRONI
PERRONI & RAULS, P.A.
1523 S. Broadway
Little Rock, Arkansas 72202
Telephone: (501) 376-7707

Attorney for Petitioner

QUESTIONS PRESENTED

1. Whether the "occurrence of any event affecting" language of 42 United States Code §1396h (a) (3) is so vague as to be violative of the due process of law clause of the Fifth Amendment to the United States Constitution.

2. Whether the Indictment states a criminal offense.

3. Whether the standard for determining the "level of care" of nursing home patients under the Arkansas Medicaid Plan, constituted the basis of the Indictment and, if so, whether that underlying standard is so vague as to be violative of the due process of law clause of the Fifth Amendment to the United States Constitution.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

Mabel Huckaby petitions for a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Eighth Circuit in this case.

OPINIONS BELOW

The opinion of the Court of Appeals for the Eighth Circuit, filed December 13, 1982, is attached hereto as Appendix A, *infra*, (p. A1). The January 6, 1983, denial of Petitioner's Petition for Rehearing and Suggestion for Rehearing En Banc is attached as Appendix B, *infra* (p. A13).

JURISDICTION

The judgment of the Court of Appeals was entered December 13, 1982. A timely Petition for Rehearing and Suggestion for Rehearing En Banc was denied January 6, 1983. This Petition for Certiorari was filed within sixty (60)

days of that date. This Court's jurisdiction is invoked under 28 U.S.C. §1254 (1).

FEDERAL STATUTES, RULES AND CONSTITUTIONAL PROVISIONS INVOLVED

Title 42 U.S.C. §1396h (a) (3) (B) states that:

> (a) Whoever—
>
> (3) Having knowledge of the occurrence of any event affecting . . . (B) the initial or continued right to any such benefit or payment of any other individual in whose behalf he has applied for or is receiving such benefit or payment, conceals or fails to disclose such event with an intent fradulently to secure such benefit or payment either in a greater amount or quantity than is due or when no such benefit or payment is authorized, . . .
>
> (shall be guilty of a criminal offense).

The Fifth Amendment to the United States Constitution states that:

> No person shall be deprived of life, liberty or property without due process of law.

STATEMENT OF THE CASE

The Petitioner, Mabel Huckaby, was indicted by the Grand Jury for the Eastern District of Arkansas and charged with ten (10) counts of violating Title 42 U.S.C. §1396h (a) (3). The Indictment is attached as Appendix C, *infra* (pp. A13-20).

The Indictment, in summary form, charged Mrs. Huckaby, a nursing home administrator, with fraudulently concealing and failing to disclose the actual level of care *provided* by Cumberland Lodge Nursing Home, Little Rock, Arkansas to ten (10) Medicaid recipients, who were patients in the nursing home, for the purpose of securing Medicaid payments in a greater amount than was due.

The allegations were that during 1979 nursing homes in Arkansas were to be reimbursed for services provided to Medicaid recipients under the Arkansas Plan according "to the level of care *required* by the particular Medicaid recipient." In order to administer the reimbursement program for nursing homes the Arkansas Division of Social Services, Department of Human Services, classified Medicaid recipients in nursing homes into three categories according to the level of care *required* by the recipient. The categories were (1) skilled care patients; (2) intermediate care patients; and (3) minimum care patients. The categories fixed the amount of money to be reimbursed to a nursing home for the Medicaid patient in question and nursing homes received a greater amount of payments under the Program for Medicaid recipients who required skilled care than for those who required either intermediate or minimum care. The difference in payments for intermediate and minimum care were also on a decreasing scale.

The Office of Long Term Care, Arkansas Division of Social Services, Department of Human Services, received information relating to the classification of Medicaid recipients in nursing homes, classified those patients and

paid claims submitted by the nursing homes for services rendered to those recipients.

Mrs. Huckaby was convicted on each of the ten (10) counts contained in the Indictment on March 16, 1982. Prior to the return of the jury's verdicts, the District Court denied defense motions for judgment of acquittal on eight (8) counts and reserved ruling on the motions for judgment of acquittal as to Counts VI and X of the Indictment.

On May 25, 1982, the date Mrs. Huckaby was sentenced, the District Court granted the motions for judgment of acquittal as to Counts VI and X for the reason that the evidence was insufficient to support the jury verdicts as to those counts.

Mrs. Huckaby appealed from her judgment of conviction on the remaining eight counts of the Indictment and the United States Court of Appeals for the Eighth Circuit affirmed the trial court's judgment.

REASONS FOR GRANTING THE WRIT

Mrs. Huckaby's case presents unique and critical questions which have not been addressed by this Court and for which the various Circuit Court of Appeal are presently without guidance.

I.

THE UNCONSTITUTIONALITY OF THE "OCCURRENCE OF ANY EVENT AFFECTING" LANGUAGE OF 42 U.S.C. §1396h (a) (3).

This issue is one of unusual importance since the Court of Appeals decision below adds a suspect dimension to prosecutions under the penalties provision of the Medicaid Act of 1977.

The gravamen of the offenses charged in this case is that under the Arkansas Medicaid Plan providers of long term care were to be reimbursed in an amount that depended upon the level of care a medicaid recipient *required*. The Arkansas Department of Social Services, who administered the Plan, retained the services of a private physician, Dr. Roy A. Brinkley, to classify all Medicaid recipients as skilled care (class A), intermediate care (class B), or minimum care (class C).

In making such a determination Dr. Brinkley utilized certain criteria or standards attached as Appendix D, *infra*, (pp. 21-22). Dr. Brinkley personally formulated these standards using certain guidelines that were promulgated in federal regulations, some of his "own thoughts", and relied on a particular form identified as Arkansas Social Services Evaluation of Need for Nursing Home Care Form SS-703 that was regularly submitted by each provider for each nursing home patient. An example of the Form is attached as Appendix E, *infra* (pp. A23-24).

The purpose of the 703 Form was to describe, so far as the form permitted, a patient's physical and mental condition. The forms constituted the foundation of the government's proof that Mrs. Huckaby concealed and failed to disclose the actual level of care *provided* by her nursing home to ten (10) Medicaid recipients who were patients in the home.

The patients constituting the ten (10) Counts of the Indictment and a summary of their physical condition at the time in question while in the nursing home is as follows:

Patient	Age	Diagnosis	Prognosis
1.) Grayce Murray	87	ASHD Arthritis Generalized Arteriosclerosis	Poor
2.) Thomas Cassidy	40	Schizophrenia Paranoid Chronic Emphysema	Poor
3.) Glen Morton	61	Diabetes Hypertension	Fair
4.) Mary Welch	67	Acute Bronchitis- Peptic Ulcer Disease, Pulmonary Obstructive Disease	Poor
5.) Catherine Yaniger	89	Cataracts (L) eye Arteriosclerosis-Hypertension	Fair
6.) Johnny Gidron	47	CA (Cancer) Arteriosclerosis, Post Hip Fx (Fracture)	Poor

7.) Lola Turney	72	Phlebotrombosis Cellulitis Hypertension Cardiovascular Disease	Fair
8.) William Moore	65	Emphysema-Seizures COPD (Chronic Obstructive Pulmonary Disease)	Poor
9.) Myrtle Knight	86	Arteriosclerosis DJD (Degenerative Joint Disease) OBS (Organic Brain Syndrome)	Fair
10.) Sreathie Huett	83	Congestive heart failure Bronchitis	Poor

A 703 Form for each patient was submitted to Arkansas Social Services for the purpose of re-classifying these patients from their existing status, i.e., minimum care, to intermediate care.

The jury returned verdicts of guilty on all charges, but the District Court granted a motion to set aside the verdict as to those counts relating to Johnny Gidron and Sreathie Huett.

Mrs. Huckaby attacked §1396h (a) (3) on the ground that, under the circumstances of this case, the "*occurrence of any event affecting*" language under which she was prosecuted is so overly broad and vague as to be unconstitutional. However, the Court of Appeals held that when read as a whole, the statute gives fair warning of the prescribed conduct and is "clearly constitutional" (Appendix A, p. 11).

In so holding, the Court of Appeals has fashioned a decision that imposes upon Mrs. Huckaby, and all others similarly situated, a *duty* to perform an act not imposed by law. The 703 Forms did not require a disclosure of the "actual level of care provided."

The Court of Appeals found that Mrs. Huckaby misrepresented or caused to be misrepresented certain information on the 703 Forms. However, Mrs. Huckaby was not charged with filing false 703 Forms and the only permissible inference that could have been drawn by any misrepresentations, false or otherwise, would be that the patients conditions were not as represented, not that Mrs. Huckaby's nursing home was providing a level of care which was less than what, in Dr. Brinkley's opinion, was required.

Section 1396h (a) (3) contains no provision defining how a person subjected to its terms would determine when a duty would arise to disclose an *event* that might have an affect on that person's continued receipt of benefits. This crucial portion of the statute does not contain words of fixed meaning or made definite by statutory or judicial definition. This fact alone demonstrates that application of the law will in most instances be without fair notice and will vary with the impressions of jurys and judges or the opinions of doctors. The conclusion drawn by the Court of Appeals that the "actual level of care provided" constitutes the "occurrence of an event affecting" the continued right to benefits, clearly demonstrates the breadth that the statute has now been allowed to expand.

A penal statute "must be sufficiently explicit to inform those who are subject to it what conduct on their part will render them liable to its penalties" and "a statute which either forbids *or requires* the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application violates the first essential of due process of law (Emphasis added)." *Connally v. General Construction Co.*, 269 U.S. 385, 391 (1926). In order to be upheld, the criminal statute should employ words or phrases having "a technical or other special meaning, well enough known to enable those within their reach to correctly apply them, or a well-settled common law meaning." *Connally v. General Construction Co., supra.* Also see, *United States v. Cohen Grocery Co.*,

255 U.S. 81 (1920), *Grayned v. City of Rockford*, 408 U.S. 104 (1972), *Lanzeta v. New Jersey*, 306 U.S. 451 (1939), and *Recent Supreme Court Developments Of The Vagueness Doctrine: Four Cases Involving The Vagueness Attack On Statutes During The 1972-1973 Term*, 7 Conn. L. Rev. 94 (1974).

Accordingly, the finding of the Court of Appeals that 42 U.S.C. §1396h (a) (3) is not violative of the due process of law clause of the Fifth Amendment should be reviewed by this Court.

II.

THE INDICTMENT FAILS TO STATE A CRIMINAL OFFENSE.

Under §1396h (a) (3), a federal crime has not been committed unless the Indictment alleges and the government proves the knowing "occurrence of (an) event affecting" the provider's initial or continued right to receive Medicaid payments on behalf of patients.

In the introductory material found in Count I of the Indictment, the grand jury alleges that Medicaid recipients were to be reimbursed according to the level of care "*required*" by the particular Medicaid recipient (Appendix E, *infra*, p. A15). In addition, the Indictment alleges that the amount of money which a nursing home receives under the Arkansas Medicaid Program depends upon the patient classifications (Appendix E, *infra*, p. A15). Finally, the Indictment alleges that Mrs. Huckaby, with intent to defraud the United States of America and the State of Arkansas, "did conceal and fail to disclose the actual level of care *provided* by Cumberland Lodge Nursing Home" to ten (10) Medicaid recipients (Appendix E, *infra*, pp. A16-23).

The Court of Appeals characterized the 703 Forms as documents used to assist Arkansas Social Services in

identifying the "level of care each Medicaid patient *needs*." (Appendix A, *infra*, p. A2). The Court of Appeals also characterized Mrs. Huckaby's attack on the sufficiency of the Indictment as an attempt to restrict §1396h (a) (3) only to the artificially narrow category of cases such as death or the transfer of a patient.

The Petitioner is not attempting to restrict application to only those categories of cases, but the case law would appear to suggest such a restriction. See, e.g., *United States v. Morrison*, 43 FRD 516 (N.D. Ill. 1967) and *United States v. Barrington*, 662 F.2d 1046 (4th Cir. 1981).

The Court of Appeals holding is also inconsistent with those principles enunciated in *United States v. Porter*, 591 F.2d 1048 (5th Cir. 1979). The concept "actual level of care provided" must, of its own weight, suggest something that is subject to varied interpretation and change. The Indictment does not allege a circumstance which would constitute the "occurrence of any event affecting" the continuation of benefits and fails to allege that Mrs. Huckaby knew of any such event which would give rise to a duty to disclose. See, *United States v. Zacher*, 586 F.2d 912 (2nd Cir. 1978).

Since the 703 Forms were the only forms required to be filed, and there is no requirement on those forms to report the actual level of care *provided*, there was no failure on Mrs. Huckaby's part to disclose anything. Therefore, the Indictment does not contain allegations within the purview of §1936h (a) (3). Accordingly, the Court of Appeals' conclusion that the Indictment is sufficient should be reviewed by this Court.

III.

THE STANDARDS FOR DETERMINING THE "LEVEL OF CARE" OF NURSING HOME PATIENTS UNDER THE ARKANSAS MEDICAID PLAN PROVIDED THE BASIS FOR

THE INDICTMENT AND THE STANDARDS ARE UNCONSTITUTIONALLY VAGUE.

The issue before the Court is one of extreme importance to the various Circuits. The government prosecuted Mrs. Huckaby for concealing and failing to disclose the actual level of care provided to ten (10) patients in her nursing home. The evidence revealed that a physician, Dr. Roy A. Brinkley, used the information that was supplied in the 703 Forms for those particular patients and certain standards promulgated by the Arkansas Department of Social Services to classify those patients. This type of procedure is utilized in many other jurisdictions and may provide the basis for criminal prosecutions of other nursing home owners and operators.

The Court of Appeals stated that Mrs. Huckaby's attack on the Indictment in this manner, i.e., that vague, ambiguous, uncertain and indefinite standards are incorporated into the Indictment, was "fallacious" (Appendix A, *infra*, p. A10). The Court of Appeals further held that Mrs. Huckaby was "not charged with misapplying the standards." (Appendix A, *infra*, p. A10). Instead, the Court of Appeals stated that Mrs. Huckaby was charged with "putting false information on a form with intent to defraud the government in violation of a federal statute." (Appendix A, *infra*, p. A10). It is interesting to note that one of the government's key witnesses, Betty Johnson, prepared the comments on page two of Appendix E. Even though such comments were consistent with the entries on page one, the Defendant was held to have put false information on page one.

The trial testimony of Dr. Brinkley is attached as Appendix F, *infra*, (pp. A25-181). The criteria or standards utilized by the Arkansas Department of Social Services for determining the "level of care" of nursing home patients under the Arkansas Medicaid Plan is attached as Appendix D, *infra*, (p. A21-22).

The 703 Forms themselves do not, under the facts of this case, exclusively determine the classification that is given to a particular Medicaid recipient. In this case, Dr. Brinkley was solely responsible for exercising the medical judgment necessary to determine the patient's classification. His testimony also demonstrated that his classification is made on the basis of his medical judgment, the 703's, and the Arkansas Social Services standards for determining the three patient classifications. The standards are patently vague, ambiguous, uncertain and indefinite for criminal prosecution purposes. Mrs. Huckaby concedes that she was not charged with misapplying the standards, but this does not change the fact that the standards were utilized by Dr. Brinkley in deciding Mrs. Huckaby's guilt. Dr. Brinkley confirmed this by testifying that "you would have to exercise some judgment as to what was being told you and how to apply it into the criteria that we were using." (Appendix F, *infra*, p. A25-181).

If the government established anything with regard to the submission of the 703 Forms and their relationship to the Arkanas Department of Social Services Medicaid criteria or standards, it proved that Mrs. Huckaby arguably may have provided excessive services to patients.

The Justice Department and Congress experienced a significant amount of difficulty with the intent and meaning of the penalty statutes found in the Medicaid Act of 1977. In 1977, Congress amended §1395 nn (b) and increased the penalties for violations of that statute. Of significance in this case is the fact that Congress completely changed the wording of the statute and attempted to define with greater specificity the crime. The reason for this change was due to the fact that Congress, and many United States Attorneys, felt "that the existing language of these penalty statutes (42 U.S.C. §§1395 nn and 1396h) is unclear and needs clarification." H.R. Rep. No. 95-393 (II, 95th Congress, 1st Sess. 53 (1977), reprinted in U.S. Code Cong. & Admin. News, pp. 3039-3055 (1977); and *United States v. Porter*, supra at p.

1054. Moreover, the legislative history of the Act provides additional insight into the opinion and judgment problems that have consumed this case. While Mrs. Huckaby does not concede that excessive services were furnished to her patients in this case, the following excerpt is helpful to determine Congressional intent regarding the scope of the criminal penalties provision of the Act:

> Furnishing excessive services is probably the most costly *non-criminal* abuse faced by health benefits programs (emphasis added). At the same time, it is relatively difficult to prove and correct. Since the medical needs of a particular patient can be highly judgmental, it is difficult to identify program abuse as a practical manner (sic) unless the over utilization is grossly unreasonable. U.S. Code Cong. Admin. News, 3050 (1977).

The underlying standards for determining the "level of care" of nursing home patients are vague, ambiguous, uncertain and indefinite. Consequently, the charges, which must necessarily adopt the standards, are unconstitutionally vague. Accordingly, the Court of Appeals' conclusion that the Indictment did not incorporate unconstitutionally vague standards should be reviewed by this Court.

CONCLUSION

The decision of the Court of Appeals presents serious questions concerning the constitutionality of the penalties provisions of the Medicaid Act of 1977 and the validity of the Indictment returned against Mrs. Huckaby. Accordingly, this Court should grant Mrs. Huckaby's petition and decide each of the questions presented.

Respectfully submitted,

SAMUEL A. PERRONI
PERRONI & RAULS, P.A.
1523 S. Broadway
Little Rock, Arkansas 72202
Telephone: (501) 376-7707

Attorney for Petitioner